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### Pop-Up windows do not infringe anti-Spam Law

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## PRESENTE:

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### Pop-Up windows do not infringe anti-Spam Law

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The Utah Court of Appeals rejected arguments that pop-up messages for Celebrity Cruises infringed a Utah state law regulating unsolicited "electronic messages. The Court held Utah's Unsolicited Commercial and Sexually Explicit Email Act was not intended to target pop-up messages, but only electronic mails. In Europe, a similar debate is held on the scope of the opt-in regime for electronic mails.

In the present case, the plaintiff, a Salt Lake City attorney, principle argument was that the definition of "e-mail" encompasses pop-up messages. Therefore pop-ups are subject to the same limitations the Act places on "traditional" e-mails. As the European electronic commerce Directive, the Utah Act requires that commercial emails are identified as such. This gives the addressee the option of deleting the e-mail before ever viewing its content. In addition, the act defines electronic mail as "an electronic message, file, data, or other information that is transmitted: (i) between two or more computers, computer networks, or electronic terminals; or (ii) within a computer network."

The Court rejected this view and held the Act's application is limited to electronic mail sent to e-mail addresses. While an e-mail is sent electronically, through the medium of an Internet service provider and targets a specific person at a specific address, pop-ups are not sent to specifically predefined destinations. On the contrary, the pop-up host website produces the message by directing the browser to open another window and to display particular content. Because pop-ups are not sent to e-mail addresses, pop-up messages simply do not come within the Act's definition of e-mail.

In Europe, article 2(h) of Directive 2002/58/EC defines electronic mail as "any text, voice, sound or image message sent over a public communications network which can be stored in the network or in the recipient's terminal equipment until it is collected by the recipient". In other words, any message that is (i) stored in a network or in the recipient's terminal equipment and (ii) is collected by the recipient, should be considered as an electronic mail. Although this definition is somewhere similar to the one in the Unsolicited Commercial and Sexually Explicit Email Act, one can defend that "European pop-ups" are electronic mails.

As to the first requirement, a pop-up window is not only stored in the network, e.g., on the http server of the pop-up window sender, but is also stored in the terminal equipment of the recipient. In absence of any reference in this regard, all storages in the terminal equipment must be considered, even when only for a few milliseconds. Before a pop-up

window can be displayed on one's computer screen, it needs to be stored in the RAM memory of the video card, i.e., a part of the recipients terminal equipment.

As to the second requirement, one could defend that a pop-up message is collected by the recipient, merely by connecting his terminal equipment, i.e., client side, with the server concerned. Indeed, one will have it difficult to defend that an hotmail address is not considered as an electronic mail address. However, unlike the more traditional inboxes, using the POP, IMAP or SMTP protocol, a hotmail "inbox" must be considered as a private HTTP web page. From a technical and functional point of view, there is not much difference between the functioning of a pop-window and the display of your "inbox" on [www.hotmail.com](http://www.hotmail.com). One of the only differences is that access to the latter page is subject of giving the corresponding personal login and password, often stored on a cookie or similar device.

Eventually, technology neutral character of the new regulatory framework for electronic communications must be kept in mind. In this view, one may consider the effect that such messages have, for instance, to what extent can receivers be annoyed. The reference to the internet service provider can then be left in the sidelines of the debate.

The decision of the Court of Appeal is [available on this site](#).

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